IN THE SUPREME COURT OF ALABAMA

THOMAS DOUGLAS ARTHUR, Petitioner/Appellant, v. STATE OF ALABAMA, Respondent/Appellee.	Jefferson County Circuit Court No. CC-87-577 Court of Criminal Appeals No. CR-00-1393

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

Petitioner/Appellant, Thomas Douglas Arthur, petitions this Court to issue a writ of certiorari to the Alabama Court of Criminal Appeals to review the decision of that court, issued on April 25, 2001, affirming the Order of the Jefferson County Circuit Court dismissing Mr. Arthur's Rule 32 Petition. *Arthur* v. *State*, No. CR-00-1393, slip op. (Ala. Crim. App. April 25, 2001). On July 27, 2001, the Court of Criminal Appeals overruled Mr. Arthur's application for rehearing.

STATEMENT OF FACTS

On December 5, 1991, Mr. Arthur was convicted of capital murder in violation of Ala. Code §§13A-5-40(13)(murder by a person with a previous murder conviction in the past twenty years) for the 1982 killing of Troy Wicker.[1] On the same day, following a sentencing

[1] Mr. Arthur was initially tried for this offense in 1982 in the Colbert County Circuit Court. However, his conviction and death sentence were overturned by the Alabama Supreme Court because

hearing that ended less than an hour and a half after the guilty verdict was returned, the jury recommended the death penalty by a vote of 11-1. On January 24, 1992, the trial court, finding one aggravating factor and one mitigating factor, sentenced Mr. Arthur to death.

Mr. Arthur's conviction and death sentence were affirmed by the Alabama Court of Criminal Appeals on March 8, 1996. *Arthur* v. *State*, 711 So. 2d 1031 (Ala. Cr. App. 1996). The Alabama Supreme Court affirmed on November 21, 1997. *Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1998). A motion for rehearing was denied on March 20, 1998. Mr. Arthur never received a copy of the certificate of final judgment.

Mr. Arthur was unrepresented by counsel from March 20, 1998, when the Alabama Supreme Court denied his motion for rehearing, until mid to late October 2000, when undersigned pro bono counsel agreed to represent him in his state and federal post-conviction proceedings. During those two-and-a-half years that Mr. Arthur was unrepresented, he diligently tried to obtain an attorney or other legal assistance to aid in the preparation and filing of a petition for post-conviction relief from his conviction and

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the prosecutor had improperly introduced detailed evidence about a killing that had resulted in Mr. Arthur's 1977 murder conviction. *Ex parte Arthur*, 372 So. 2d 665 (Ala. 1985).

Mr. Arthur was tried again, this time on a change of venue to Jefferson County, in 1987. However, the Court of Criminal Appeals set aside his conviction and death sentence, based on the improper admission of a custodial statement made by Mr. Arthur to investigators after he had invoked his right to counsel, and on numerous instances of prosecutorial misconduct by the Colbert County District Attorney, Gary Alverson. *Arthur* v. *State*, 575 So. 2d 1165 (Ala. Crim. App. 1990), *cert. denied*, 575 So. 2d 1191 (Ala. 1991).

sentence. Solely because of the lack of legal assistance available to him, Mr. Arthur never even filed with the United States Supreme Court a petition for a writ of certiorari to the Alabama Supreme Court on direct appeal. In fact, in a letter dated June 8, 1998, well within the ninety days allotted for filing a petition for a writ of certiorari with the U.S. Supreme Court, Mr. Arthur wrote to the Court to request an extension of time in which to file the petition, for he had no attorney and was using every mailing allowance he had to find counsel to at least assist him in preparing and filing a petition. Mr. Arthur's ignorance of the law and Court rules was readily apparent, as by letter dated June 19, 1998, the Clerk of the U.S. Supreme Court, with no response at all to Mr. Arthur's need for counsel, informed him that he had not followed the Court's rules.

Additionally, during 1998 and 1999, because the State had no mechanism for providing him any legal assistance, much less an attorney, Mr. Arthur had to try to obtain legal assistance on his own while confined to his cell on death row. Mr. Arthur wrote letters to numerous lawyers and attorney associations, including the American Bar Association, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, and the Southern Poverty Law Center, requesting their help in obtaining legal representation or some other legal assistance. Mr. Arthur also had someone post his plea for legal assistance, along with a brief statement about his case, on the Internet. Eventually, an investigator who viewed the website became interested in Mr. Arthur's case and offered his assistance in both investigating and finding counsel. His written requests to visit Mr. Arthur to discuss the case, however, were denied in writing by the Holman Prison Warden, Charlie Jones. Similarly, Warden Jones denied the investigators access to Mr. Arthur even after receiving a letter from a lawyer who stated that he was considering representing Mr. Arthur and who asked that the

investigators be permitted to visit with Mr. Arthur on his behalf.

The State of Alabama failed to provide Mr. Arthur with an adequate law library or other assistance that would have enabled him to file timely post-conviction petitions in state and federal court. Over the entire time that the deadlines for filing post-convictions were running, Mr. Arthur has been on death row in Holman Prison, located in Atmore, Alabama.

Holman Prison contains separate law libraries for the inmates in general population and the inmates on death row. The death-row law library at Holman Prison is much smaller and significantly less equipped than the law library used by the inmates in general population. It must be shared by all of the more than one hundred and fifty death-row inmates at Holman. The death-row library is used primarily as a day room, not as a library at all.

Many of the important books are missing entirely and the ones that are left behind have had important pages torn out of them. The books are wet from constantly being leaked on and are covered with mildew. The relatively few books that are contained in the library are in poor condition and are kept in piles, instead of on shelves. Moreover, they are not piled in any particular order, making finding a desired book, on the off-chance it is even stocked in the library at all, a time-consuming and hazardous exercise, and often a futile one.

There are no paralegals or other persons trained in the law assigned to work in the death-row law library, leaving literally nobody to teach the inmates how to use the few useful books that may be there. The books are out of date, and there is no practice of advising the inmates of the infrequent arrival of the less out-of-date books.

In addition, there is only one typewriter to be shared by all one hundred and fifty death-row inmates and even that is almost always broken. There is only one copy machine, but it charges fifty cents per copy, which makes photo copying cases and statutes practically fiscally impossible. Moreover, the death-row inmates are not provided legal pads. They are provided only two stamps per week, on a use-them-or-lose-them basis, which generally is insufficient to send out the types and numbers of pleadings necessary even to commence a post-conviction proceeding.

Thus, the law library provided by the State of Alabama for the death-row inmates at Holman Prison, where Mr. Arthur has been continuously held while the statute of limitations was running, fails to provide even the most basic resources necessary for preparing, filing, and serving a meaningful petition for post-conviction relief.

After Mr. Arthur finally procured the undersigned pro bono counsel, the preparation and filing of his Rule 32 Petition proceeded expeditiously. On January 25, 2001, Mr. Arthur's pro bono counsel filed with the Jefferson County Circuit Court his first Rule 32 Petition and a Motion to File Out of Time. These filings were submitted two months before the Alabama Supreme Court set an execution date.

The Rule 32 Petition and the accompanying motion set forth numerous grounds for relief on the merits and requested a hearing to address disputed issues of fact and to present evidence. Importantly, the Rule 32 Petition raised issues that *have never before been litigated* in Mr. Arthur's case, and that, in fact, could not have been raised before post-conviction proceedings, such as the ineffective assistance of trial and appellate counsel.

Mr. Arthur's state post-conviction petition contended, *inter alia*, that his trial counsel was ineffective for failing to argue for the disqualification of the prosecutor due to his irreconcilable conflict of interest with the chief trial witness;

for moving for the appointment of Mr. Arthur as his own "co-counsel" without any inquiry by the court or counsel as to his competency or his understanding of its ramifications and despite the severe prejudice that accrued to Mr. Arthur; for presenting overtly damaging evidence to the jury at trial; for his failure to perform even rudimentary pre-trial investigation or obtain expert assistance; for his repeated failure to object to gross misconduct by the prosecutor and errors by the trial court during the jury selection and trial. Moreover, the Rule 32 Petition alleged ineffectiveness of trial counsel at the sentencing phase, including, but not limited to, his failure to perform any investigation for mitigating evidence; his own submission of damaging evidence to the jury; and his failure to object to prejudicial and improper comments during the prosecutor's closing statement.

In addition, Mr. Arthur's Rule 32 Petition set forth instances of juror misconduct, violations of *Brady* obligations, and ineffective assistance of appellate counsel.

Further, the Motion to File Out of Time presented factual and legal grounds for allowing the submission of his Rule 32 Petition beyond the statutory deadline, including whether and when Mr. Arthur had access to legal assistance to aid in the preparation and filing of a Rule 32 Petition on his behalf. The State's response to this motion contained factual allegations that were disputed by Mr. Arthur with specific references to the record and that required resolution by a fact-finder after a hearing.

Without addressing any of the arguments presented by Mr. Arthur, nor ruling on the disputed issues of fact raised in the papers, the Circuit Court granted the State's motion to dismiss the Rule 32 Petition by simply signing the draft Order and Findings of Fact and Conclusions of Law submitted by the attorney representing the State. By his counsel, Mr. Arthur submitted a motion to reargue the

Circuit Court's summary dismissal, which was denied on April 4, 2001.

On April 20, 2001, Mr. Arthur filed his brief in this Court, and the State filed its brief in response on April 24, 2001. On April 25, 2001, this Court issued its decision affirming the circuit court's summary dismissal of Mr. Arthur's Rule 32 Petition. Also on April 25, 2001, Judge Edwin Nelson of the United States District Court for the Northern District of Alabama granted Mr. Arthur's motion for a stay of execution. The district court's Order granting the stay of execution was unanimously upheld by the United States Court of Appeals for the Eleventh Circuit on April 26, 2001. Also on April 26, 2001, the State's application to vacate the stay of execution was denied by the United States Supreme Court.

GROUNDS FOR ISSUANCE OF WRIT OF CERTIORARI

This petition for writ of certiorari is based on two grounds under Rule 39. Under Rule 39(a)(1)(C), Mr. Arthur respectfully petitions this Court to review the decision of the Court of Criminal Appeals, because the material questions requiring decision are issues of first impression in this Court. Mr. Arthur also petitions this Court to review the decision of the Court of Criminal Appeals under Rule 39(a)(1)(D), because the decision of that court is in conflict with prior decisions of the Supreme Court of the United States.

Under Rule 39(a)(l)(C), Mr. Arthur asks this Court to decide: Whether it is a violation of the Alabama Constitution of 1901 or of the Fifth, Sixth, Eighth, or Fourteenth Amendments to the United States Constitution to execute Mr. Arthur, even though, solely because of the State's failure to provide him an attorney or any other legal assistance to assist him in preparing and filing a first petition for post-conviction relief, Mr. Arthur's numerous meritorious claims of constitutional error raised in his first Rule 32 Petition have

never been reviewed or litigated in any state or federal court.

Under Rule 39(a)(1)(C), Mr. Arthur also asks this Court to decide: Whether the failure of Mr. Arthur, a death-row inmate who was unrepresented by counsel and who was not provided any lawyer or other legal assistance in preparing and filing his Rule 32 Petition for the entire period of the statute of limitation, to file a first petition for post-conviction relief within the limitation period is subject to the good cause and excusable neglect extensions contained in Rule 1.3 of the Alabama Rules of Criminal Procedure.

Under Rule 39(a)(1)(C), Mr. Arthur also asks this Court to decide: Whether Mr. Arthur had a constitutional right under the Alabama Constitution of 1901 and under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution to legal assistance in preparing and filing his Rule 32 Petition, given that the Rule 32 Petition was the first opportunity for Mr. Arthur to raise claims of ineffective assistance of trial or appellate counsel and juror misconduct.

Under Rule 39(a)(1)(C), Mr. Arthur also asks this Court to decide: Whether a jurisdictional defect may exist due to the irreconcilable conflict of interest that arises from the prosecutor's former representation of his star witness in regard to the same crime for which he then prosecuted Mr. Arthur, including, but not limited to, the prosecutor's presentation of evidence such as his former client's testimony, to the Grand Jury and at trial.

Under Rule 39(a)(1)(C), Mr. Arthur also asks this Court to decide: Whether holding Mr. Arthur, who was no longer represented by counsel, to the two-year statute of limitations when the State failed to inform Mr. Arthur that a certificate of judgment had issued and that his time for filing a petition for post-conviction relief had started to run, violates Mr. Arthur's rights under the Constitutions of the United States

and the State of Alabama to due process of law and fundamental fairness.

Under Rule 39(a)(1)(C), Mr. Arthur also asks this Court to decide: Whether the summary dismissal of Mr. Arthur's Rule 32 Petition as untimely violates Mr. Arthur's rights to equal protection under the law and due process of law under the Federal and State Constitutions, given that untimely Rule 32 Petitions have been permitted and decided by the circuit courts and the Court of Criminal Appeals.

Under Rule 39(a)(1)(D), Mr. Arthur asserts that the decision of the Court of Criminal Appeals is in conflict with prior decisions of the Supreme Court of the United States, such as *Bounds* v. *Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977); *Casey* v. *Lewis*, 518 U.S. 343, 116 S. Ct. 2174 (1996); *Murray* v. *Giarratano*, 492 U.S. 1, 109 S. Ct. 2765 (1989); *Lonchar* v. *Thomas*, 517 U.S. 314, 116 S. Ct. 1293 (1996); *Stanford* v. *Kentucky*, 492 U.S. 361, 369-70, 109 S. Ct. 2969, 2975 (1989); and *Trop* v. *Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598 (1958).

In affirming the circuit court's dismissal of Mr. Arthur's first Rule 32 Petition, the Court of Criminal Appeals implicitly found that the dismissal did not violate Mr. Arthur's right to meaningful access to the courts, *see generally Arthur* v. *State*, No. CR-00-1393, slip op. at 4-8 (Ala. Crim. App. April 25, 2001), which is in conflict with the decisions of the United States Supreme Court in *Bounds* v. *Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977), and *Casey* v. *Lewis*, 518 U.S. 343, 116 S. Ct. 2174 (1996). Also, Mr. Arthur had a constitutional right under the Alabama Constitution of 1901 and under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution to legal assistance in preparing and filing his first Rule 32 Petition, and the failure of the State of Alabama timely to provide legal assistance to Mr. Arthur caused the Petition not to be timely filed. The decision of the Court of Criminal Appeals, implicitly finding otherwise, is therefore in conflict with

decisions of the United States Supreme Court, such as *Murray* v. *Giarratano*, 492 U.S. 1, 109 S. Ct. 2765 (1989).

The United States Supreme Court has held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds* v. *Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498 (1977); *see also Lewis* v. *Casey*, 518 U.S. 343, 346, 116 S. Ct. 2174, 2177 (1996)("Prison law libraries and legal assistance programs are . . . the means for ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'").

In this case, Mr. Arthur's fundamental right to meaningful access to the courts was violated by the State's failure to provide adequate legal assistance or resources, such as an adequate law library, to enable him to prepare and file a timely and sufficient first petition for post-conviction relief under Rule 32.

The injury suffered by Mr. Arthur from the State's failure to allow him access to courts is actual and severe: his first and only filing for state post-conviction relief has been dismissed as untimely, and his first petition for a writ of habeas corpus has been filed out of time in federal court.

The trial court, therefore, should not have dismissed the Rule 32 Petition without a hearing. At the very least, the trial court should have granted a hearing at which the issue of access to the courts could have been developed and resolved. *See Whalem v. Hunt*, 233 F.3d 1146, 1148 (9th Cir. 2000)(ordering hearing on inadequacy of library and research difficulties); *Helton* v. *Secretary for the Dept. of Corr.*, 233 F.3d 1322, 1325 (11th Cir. 2000)(affirming district court's determination that limitation period should be equitably tolled, in part, because of found deficiencies in the prison

library system). Likewise, the Court of Criminal Appeals erred in affirming the circuit court's dismissal of Mr. Arthur's Rule 32 Petition without a hearing.

In addition, Mr. Arthur had a constitutional right to legal assistance in preparing and filing his Rule 32 Petition under *Murray* v. *Giarratano*, 492 U.S. 1, 109 S. Ct. 2765 (1989). In *Giarratano*, the Supreme Court held that the Virginia death-row inmates' constitutional rights had not been violated, because no death-row inmate in Virginia had been denied legal assistance in their state post-conviction proceedings. 492 U.S. at 14-15, 109 S. Ct. at 2772-73 (Kennedy, J. concurring in judgment and, as the fifth and deciding vote, limiting the holding). Justice Kennedy's concurrence limited the Court's holding to the circumstances of that particular case, observing that "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief." *Id.* at 14-15 (Kennedy, J. concurring in judgment). With that caveat, Justice Kennedy concluded that Virginia's scheme in particular did not violate the Constitution. *See id.* (Kennedy, J. concurring in judgment). The State of Alabama has no scheme resembling that approved of by Justice Kennedy in *Giarratano*. The decision of the Court of Criminal Appeals implicitly upholding Alabama's scheme of providing no attorney or other legal assistance to death-row inmates faced with statutory deadlines for filing petitions for state post-conviction relief, therefore, is in conflict with the Supreme Court's holding in *Giarratano*, as limited by Justice Kennedy's concurrence.

Furthermore, the decision of the Court of Criminal Appeals affirming the circuit court's Order dismissing Mr. Arthur's first petition for post-conviction relief is in conflict with the decisions of the United States Supreme Court in *Stanford* v. *Kentucky*, 492 U.S. 361, 369-70, 109 S. Ct. 2969,

2975 (1989), and *Trop* v. *Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598 (1958). The United States Supreme Court has held that in determining the requirements of the Eighth Amendment, its determination will rest on whether there appears to be a rational consensus evidencing "the evolving standards that mark the progress of a maturing society." *See, e.g., Stanford* v. *Kentucky*, 492 U.S. at 369-70, 109 S. Ct. at 2975 (quoting *Trop*, 356 U.S. at 101, 78 S. Ct. at 598). The most important indicia of these standards and whether there is a national consensus are "statutes passed by society's elected representatives." *Id.* at 370, 109 S. Ct. 2975-76. A review of state statutes reveals that there is a national consensus that death row inmates require legal assistance to pursue state post-conviction proceedings and remedies.

A review of the law in the states that have the death penalty reveals unquestionably a national consensus in favor of requiring legal assistance to death-row inmates in their first state post-conviction proceeding. In fact, only Georgia and Alabama fail to provide post-conviction assistance to inmates under sentence of death. Because this Rule 32 proceeding was the first time under state law that Mr. Arthur could be heard on his claims of ineffective assistance of trial and appellate counsel and juror misconduct, he had a constitutional right to be heard through counsel on those claims, or at least to have legal assistance in preparing and filing his Rule 32 Petition. Thus, because Mr. Arthur was not appointed counsel or provided any other legal assistance within the two-year statute of limitations, he was unable to file a timely Rule 32 Petition. Consequently, the trial court should have granted Mr. Arthur's Motion to File Out of Time and should have granted a hearing on the issues raised in the Rule 32 Petition. At the very least, the trial court should have granted a hearing on the issues of lack of legal assistance and lack of legal resources. The decision of the Court of Criminal Appeals affirming the circuit court's summary dismissal of Mr. Arthur's first petition for post-

conviction relief despite the fact that he was provided no attorney or other legal assistance in preparing and filing a timely and sufficient petition, is contrary to the "evolving standards of decency that mark the progress of a maturing society," and, therefore, is in conflict with the decisions of the Supreme Court in *Stanford* and *Trop*.

In addition, the decision of the Court of Criminal Appeals, *Arthur* v. *State*, No. CR-00-1393, slip op. at 7-8 (Ala. Crim. App. April 25, 2001), is in conflict with the decision of the United States Supreme Court in *Lonchar* v. *Thomas*, 517 U.S. 314, 116 S. Ct. 1293 (1996), because the two-year statute of limitations, as applied to Mr. Arthur, constitutes an unconstitutional suspension of the writ. Under the Alabama Constitution of 1901, the writ of habeas corpus shall not be suspended and is inviolate. The United States Constitution likewise prohibits suspension of the writ of habeas corpus.

In Alabama, the writ of habeas has been incorporated into Rule 32. That is, "Rule 32 deals only with the procedure for filing what were classified under prior practice as petitions for habeas corpus and petitions for writ of error coram nobis. Rule 32 is a procedural rule which . . . [c]onsolidates habeas corpus and coram nobis into a single comprehensive remedy." *Drayton* v. *State*, 600 So. 2d 1088, 1089 (Ala. Crim. App. 1992). Invocation of the two-year statute of limitations that applies to Rule 32 proceedings, therefore, is an unconstitutional suspension of the writ of habeas corpus under the United States Constitution and the Alabama Constitution.

"The writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack* v. *McDaniel*, 120 S. Ct. 1595, 1603 (2000). The Court has emphasized that "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar* v. *Thomas*, 517

U.S. 314, 324, 116 S. Ct. 1293, 1299 (1996). Thus, "the interest in permitting federal habeas review of a first petition is quite strong. And, given the importance of a first federal habeas petition, it is particularly important that any rule that would deprive inmates all access to the writ should be both clear and fair." *Id.* at 330, 116 S. Ct. at 1302.

A two-year time limit for a death-row inmate who is continuously without legal representation or other legal assistance is an unconstitutional restraint on the inmate's opportunity for a writ of habeas corpus.

Thus, to avoid an unconstitutional suspension of the writ of habeas corpus, the trial court should have granted Mr. Arthur's Motion to File Out of Time and granted a hearing on the issues raised in Mr. Arthur's Rule 32 Petition. At the very least, the trial court should have granted a hearing on whether the statute of limitations as applied to the facts of this case is a constitutional constraint on the writ. Accordingly, the decision of the Court of Criminal Appeals affirming the circuit court's summary dismissal of Mr. Arthur's first petition for post-conviction relief is in conflict with the Supreme Court's decision in *Lonchar*.

Accordingly, Mr. Arthur respectfully requests this Court to issue a writ of certiorari to the Court of Criminal Appeals and to reverse the decision of that court.

CONCLUSION

For these reasons, as well as all of those that were raised in the Court of Criminal Appeals, Mr. Arthur respectfully requests that this Court grant this Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals.

Dated: August 9, 2001

Respectfully submitted,

s/ Arnold Levine
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